ARKLA EXPLORATION CO.

IBLA 76-394 Decided June 21, 1976

Appeal from the rejection of high bids tendered for two parcels of land offered at a sale of competitive oil and gas leases.

Affirmed.

1. Appeals--Oil and Gas Leases: Competitive Leases

   A rejection of high bids tendered for two parcels of land offered at a sale of competitive oil and gas leases will be affirmed on appeal where the case file contains memoranda from the U.S. Geological Survey sufficient to establish that the pre-sale minimum evaluation for the two tracts was accomplished by the lease sale committee consisting of an engineer and a geologist and their evaluation was considerably in excess of appellant's bids.

2. Oil and Gas Leases: Generally--Oil and Gas Leases: Competitive Leases

   The U.S. Geological Survey is the Secretary's technical expert in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases and the Secretary is entitled to rely on its reasoned analysis.

3. Oil and Gas Leases: Competitive Leases

   Under 43 CFR 3120.3-1, the United States reserves the right to reject any and all bids. However, a decision involving the exercise of administrative discretion must be supportable on a rational basis.

APPEARANCES: Robert Roberts III, Esq., Shreveport, Louisiana, for the appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Arkla Exploration Company (Arkla) appeals from the December 9, 1975, decision of the Eastern States Office of the Bureau of Land Management rejecting Arkla's high bids for two tracts of land in the Fort Chaffee Military Reservation [Parcel No. 4 (ES 15190) and Parcel No. 5 (ES 15191)] submitted at a competitive oil and gas lease sale held April 30, 1975.

This case is before the Board for the second time. The first appeal was filed from a May 8, 1975, decision of the Eastern States Office rejecting the appellant's bids for parcels No. 4 and No. 5 on the ground that they were below the minimum acceptable bonus bids established by the United States Geological Survey. Appealing from this decision, Arkla contended that the rejected bids were more than adequate when considered in the light of pertinent geological and engineering data and business economics. On September 22, 1975, the Board issued a decision (Arkla Exploration Co., 22 IBLA 92 (1975)) in which it found that the decision of the Eastern States Office was totally unsupported by the record, thereby affording no means by which the correctness of that decision could be judged on appeal. The Board set aside the decision of the Eastern States Office and remanded the case to that Office for a compilation of a proper record and a re-adjudication of the acceptability of the bids.

On December 9, 1975, the Eastern States Office issued its second decision, which stated that it had reconsidered the acceptability of the bids in light of the additional information requested from the Geological Survey. This information was explained in the decision as follows:

> The U.S. Geological Survey in accordance with Conservation Division Manual (CDM 641.1A), evaluated the tracts before they were offered for competitive sale. The lease sale committee, consisting of an engineer assigned by the Oil and Gas Supervisor, and a geologist assigned by the Area Geologist, utilized all available geologic, engineering and economic data, and arrived at an estimate of the prospective reserves attributable to each tract. The present worth of these projected reserves was then computed, utilizing the discounted cash flow method.
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> The lease sale committee also furnished data to the Regional Mineral Economist in the Office of the Conservation Manager, Central Region, Denver, Colorado, who

made a computer probablistic analysis utilizing a program designated the "General Uncertainty Economic Simulation System".

The results of these two evaluation techniques were reviewed and compared in order to arrive at the final pre-sale minimum acceptable bonus bid for each parcel. Based on this minimum acceptable bonus bid established for each parcel, U.S. Geological Survey recommended that the high bids received for parcels No. 4 and No. 5 be rejected as inadequate.

On the basis of this data, the Eastern States Office accepted the recommendation of the Geological Survey and again rejected the bids. It is from this decision that the present appeal is brought.

Appellant contends that the second decision of the Eastern States Office suffers from the same infirmity as the original decision; that is, there simply are no facts or evidentiary matters on which an appeal can be based. Appellant submits that it is apparent that the Eastern States Office has not complied with the Board's mandate to compile a record.

[1, 2] We find that the case file hs been supplemented by memoranda from the Geological Survey office in Tulsa, dated June 24 and November 19, 1975, respectively. These memoranda are sufficient to establish that the pre-sale minimum evaluation for the two tracts of land was accomplished prior to the bid by the lease sale committee consisting of an engineer and a geologist. Their evaluation of the tracts was considerably in excess of appellant's bids.

The Geological Survey is the Secretary's technical expert in matters concerning geologic evaluations, and the Secretary is entitled to rely on its reasoned analysis. See Clear Creek Inn Corporation, 7 IBLA 200, 213-214 (1972). Those officials who made the recommendation to reject the bids were duly authorized to do so by the Director of the Geological Survey.

[3] The applicable regulation, 43 CFR 3120.3-1, provides that the United States reserves the right to reject any and all bids. A decision involving the exercise of administrative discretion must be supportable on a rational basis. In light of the additional information submitted by the Geological Survey, we find that the determination made by the Eastern States Office to reject the bids is supported by the record. John H. Larsen, 12 IBLA 244 (1973); Antoine "Fats" Domino, 7 IBLA 375 (1972).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing

Administrative Judge

I concur:

Newton Frishberg
Chief Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

The Board's decision of September 22, 1975, 22 IBLA 92, found that the decision appealed from was "totally unsupported by the record * * * [and] affords no means by which the correctness of the decision [rejecting the bids for tracts 4 and 5 can be judged on appeal."

The present record adds little to aid in that determination. The decision of the Eastern States Office of the Bureau of Land Management dated December 9, 1975, which is the decision appealed from, states as follows:

> The U.S. Geological Survey in accordance with Conservation Division Manual (CDM 641.1A), evaluated the tracts before they were offered for competitive sale. The lease sale committee, consisting of an engineer assigned by the Oil and Gas Supervisor, and a geologist assigned by the Area Geologist, utilized all available geologic, engineering and economic data, and arrived at an estimate of the prospective reserves attributable to each tract. The present worth of these projected reserves was then computed, utilizing the discounted cash flow method.
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> The lease sale committee also furnished data to the Regional Mineral Economist in the Office of the Conservation Manager, Central Region, Denver, Colorado, who made a computer probablistic analysis utilizing a program designated the "General Uncertainty Economic Simulation System."
>
> The results of these two evaluation techniques were reviewed and compared in order to arrive at the final pre-sale minimum acceptable bonus bid for each parcel. Based on this minimum acceptable bonus bid established for each parcel, U.S. Geological Survey recommended that the high bids received for parcels #4 and #5 be rejected as inadequate.
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> After comparing the minimum acceptable bonus bids established for parcels #4 and #5 with the high bids submitted by Arkla Exploration Company, it has been decided to accept the recommendation of the U.S. Geological Survey.

Appellant commented thereon as follows:

> The second Decision suffers on its face from the same infirmity that caused the Board to reverse the original holding; there simply are no facts or evidentiary matters on which an appellate decision can be based. While stating, for example, that the "present worth of these projected reserves was then computed, utilizing the discounted cash flow method," the Decision does not favor us with a scintilla of underlying data, such as the amount calculated as present worth, the estimated reserves, the discount factor, and so on. So far as concerns the "computer probablistic analysis" made by the Regional Mineral Economist, none of the data furnished for the analysis is set forth, nor is any attempt made to explain what on earth a "General Uncertainty Economic Simulation System" may be.

I heartily agree with appellant's analysis of the dearth of meaningful data from the Geological Survey. The main opinion recites that:

> The Geological Survey is the Secretary's technical expert in matters concerning geologic evaluations, and the Secretary is entitled to rely on its reasoned analysis.

But there is absolutely nothing in the record to show how the acceptable bid price was arrived at other than the statement that a geologist and an engineer estimated the prospective reserves quantum, whose value was computed, utilizing the discounted cash flow method, and that a computer probablistic analysis was made utilizing a program designated as the "General Uncertainty Economic Simulation System." Thus we have nothing to sustain the decision below other than Survey's bland assurance that it is correct and reference to a mumbo jumbo procedure, unintelligible to me, and, I would guess, also to the signatories of the main opinion.

What is implicit in the majority's opinion is that since the determination is committed to agency discretion it is unreviewable. Although it is true that many decisions hew to that line (e.g., Lewis v. Hickel, 427 F.2d 673 (10th Cir. 1970)), there are many decisions where the exercise of agency discretion is tested against the "arbitrary, capricious, * * * abuse of discretion * * *" criteria embodied in 5 U.S.C. § 706 (1970). See LaRue v.

Udall, 324 F.2d 428 (D.C. Cir. 1963), cert. denied, 376 U.S. 907 (1964). United States v. Shimer, 367 U.S. 374 (1961), recognizes that where the fact finding is plainly wrong, it cannot stand:

> More than a half-century ago this Court declared that "where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be received by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong." Bates & Guild Co. v. Payne, 194 U.S. 106, 108-109.

367 U.S. at 381, 382.

But Mr. Justice Brandeis' concurring opinion in St. Joseph Stock Yards v. United States, 298 U.S. 38 (1935), puts that doctrine into focus:

> First. An order of the Secretary may, of course, be set aside for violation of the due process clause by prescribing rates which, on the facts found, are confiscatory. For the order of an administrative tribunal may be set aside for any error of law, substantive or procedural. Interstate Commerce Comm'n v. Union Pacific R. Co., 222 U.S. 541, 547. Moreover, where what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the Court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a State. * * * It may set aside an order for lack of findings necessary to support it, Florida v. United States, 282 U.S. 194, 212-215; or because findings were made without evidence to support them, New England Divisions Case, 261 U.S. 184, 203; Chicago Junction Case, 264 U.S. 258, 262-266; or because the evidence was such "that it was impossible for a fair-minded board to come to the result which was reached." San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 442; or because the order was based on evidence not legally cognizable, United States v. Abilene & Southern Ry., 265 U.S. 274, 286-290; or because facts and circumstances which ought to have been considered were excluded from consideration, Interstate Commerce Comm'n v. Northern Pacific Ry., 216 U.S. 538, 544-545; Northern Pacific Ry. v. Department of Public Works, 268 U.S. 39, 44: or

> because facts and circumstances which ought to have been considered were excluded which could not legally influence the conclusion, Interstate Commerce Comm'n v. Diffenbaugh, 223 U.S. 42, 46-47: Florida East Coast Ry. v. United States, 234 U.S. 167, 187: or because it applied a rule thought wrong for determining the value of the property, St. Louis & O'Fallon Ry. v. United States, 279 U.S. 461.

298 U.S. at 74-75.

In B & O R. Co. v. Aberdeen & R.R. Co., 393 U.S. 87 (1968), the absence of substantial factual data in the record was noted as follows:

> We agree with the District Court that there is no substantial evidence that territorial average costs are necessarily the same as the comparative costs incurred in handling North-South freight traffic. If we were to reverse the District Court, we would in effect be saying that the expertise of the Commission is so great that when it says that average territorial costs fairly represent the costs of North-South traffic, the controversy is at an end, even though the record does not reveal what the nature of that North-South traffic is. The requirement for administrative decisions based on substantial evidence and reasoned findings -- which alone make effective judicial review possible -- would become lost in the haze of so-called expertise. Administrative expertise would then be on its way to becoming "'a monster which rules with no practical limits on its discretion.'" Burlington Truck Lines v. United States, 371 U.S. 156, 167. That is impermissible under the Administrative Procedure Act. [Emphasis supplied.]

393 U.S. at 91-92.

The vice of the case at bar is the fact that the record is completely bereft of any evidence upon which an informed judgment could be predicated as to the merits of the resource values established by the officials below.

This brings to the fore the question of why such a record was submitted to the Board.

43 CFR 4.24(a)(4) (36 F. R. 7189) provides that:

> In any case, no decision on appeal or after a hearing shall be based upon any record, statement, file or similar document which is not open to inspection by the parties to the appeal or hearing.

The resource estimate value of each tract offered for leasing is arrived at by personnel of the Geological Survey. The Geological Survey's data often includes "trade secrets and commercial or financial information obtained from a person and privileged or confidential" and "geological and geophysical information and data, including maps, concerning wells." These are exceptions to the Freedom of Information Act, 5 U.S.C. § 552 (1970).

The Geological Survey obtains from industry geological and geophysical data on a confidential data, which is helpful, if not essential, to its operations. Understandably, it wishes to protect its sources of data. However, the net effect of 43 CFR 4.24(a)(4), and of the Geological Survey's desire to protect its sources of data and of the Survey's proclivity for making its determinations in the dark is to tend to hinder this Board from making an informed determination of the merits of a case such as the one at bar.

Appellant has requested a hearing before an Administrative Law Judge. If such a hearing were to be granted, I would anticipate that the posture of the Geological Survey would be cast into doubt.

I would grant appellant's request for a hearing. There is no basis for making an informed decision in the present record.

Frederick Fishman

Administrative Judge